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ABSTRACT

This paper examines the third fair use standard in section 107 of the 1976 Copyright Act--"the amount and substantiality of the portion used in relation to the copyrighted work as a whole"--as it applies to copying for extended classroom uses such as library reserve. The guidelines are interpreted in terms of amount, substantiality, public use, and multiples of single copies. The connection of this standard with the "anthologizing" principles outlined in the fair use guidelines and with the "systematic reproduction" provision in section 108, which deals with library and archive exemptions, is also discussed. (8 references) (MES)

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# WHAT DOES COPYRIGHT HAVE TO DO WITH MY TEACHING ACTIVITIES? WHAT IS FAIR USE? WHAT IS AN ANTHOLOGY?

by Stuart Milligan

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## Abstract

The article is an analysis primarily of the third fair use standard (amount and substantiality) in section 107 of the 1976 Copyright Act and its connection with the "anthologizing" principles outlined in the fair use guidelines and with the "systematic reproduction" proviso in section 108, which deals with library and archive exemptions. It is addressed to teachers/librarians with the intent of heightening their awareness of copyright library reserve fair and unfair uses.

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## Introduction

What is an anthology? What is fair use (FU) copying? What does it have to do with the way I teach? These are loaded questions! Of course, the United States **Public Law 94-553, Title 17, The Copyright Act of 1976**[1] has a good deal to do with everyone's teaching. Common teaching activities such as pursuing research, making copies for classroom preparation and distribution, and copying for other extended classroom uses like library reserve all impinge on this law. The focus here is on this last use.

The central question is how far do the parameters and privileges of FU (section 107) and other exclusive rights exemptions stretch to accommodate my teaching needs? Secondly, what legal limitations do I have to learn to live with that, if exceeded, may infringe the copyright owner's exclusive rights? And thirdly, what institutional policies govern copying practices for the library reserve unit?

Teachers, students and librarians would have to do some fancy foot shuffling to keep from facing complexities encountered in seeking answers to these questions. A more head-in-the-sand approach would be to play it safe and simply seek alternatives to copying, bypassing the interpretational grid altogether. However, armed with good knowledge and facing the issue squarely, interpretation of the law need not be dodged. We need to know just what is there and what is not. In the end, this is public law, not just an exclusive delphic oracle left for the priests and specialists to unravel.

Many on-the-ball administrators, educators or librarians have already sought legal counsel or, on their own, established reasonable policies regulating copying practices within the educational goals and environments of their institutions. In general, the library reserve policies that have emerged across the nation bend toward a rather lenient interpretation, instead of a more restrictive one. For the most part, these policies have been derived from the **Copyright Act**[2] itself, it's various historical adjunct documents (including the **House**[3], **Senate**[4] and **Conference Reports**[5]) and the FU **Guidelines** agreed to by a number of educational and publisher parties on March 19, 1976 and April 30, 1976 in the congressional-appointed committee, the Ad Hoc Committee on Copyright Law Revision. Both the book and music **Guidelines**[6] were published in the **House Report**.

Owners tend to lament "amputation by fair use" and users rally with "censorship by monopoly". What often follows is a genuine struggle, the resolution of which should depend upon good and honest interpretation of the principles involved in the protection and use of intellectual properties. Educators and librarians are frequently both owners and users of copyrighted works and have the inclination to strike a healthy balance between these polar views.

## Amount - Third Test of Fair Use

Minimally, libraries must base their copyright policies on the provisions of section 106 ([e]xclusive rights in copyrighted works), section 107 ([l]imitations on exclusive rights: [f]air use) and section 108 ([l]imitations on exclusive rights: [r]eproduction by libraries and archives) of the **Copyright Act**[7]. In a FU defense, four standards would be analyzed in deciding if a particular copying use is an infringement or a permitted use. I will only highlight the third one, namely,

> "the amount and substantiality of the portion used in relation to the copyrighted work as a whole".[8]

Many FU cases tested in the courts have found that copying portions of copyrighted works

in excess of 10% is an unfair use. Even this percentage limit is not a definitively safe practice, since one can copy considerably less than 10% and still infringe the copyright if the portion taken is "substantial", that is, if it is the kernel or seminal part of the work. A string of court cases bear testimony to this fact. Copying for one's own personal and private use is another matter. These limitations would not apply, since the act is intended to protect public uses. Public is defined as

> "a substantial number of persons outside of a normal circle of a family and its social acquaintances".[9]

Since a library reserve use is a public use (as is a classroom use), copying for that purpose requires vigilance from teachers and librarians. Else, the risk of having legal action and embarrassment brought against the parent organization is an ever-possible scenario. Witness the recent New York University incident. As a result of the proceedings and the settling out of court, NYU, by contractual agreement, now has to operate within the rigidity of the FU **Guidelines**. The University will not defend or indemnify faculty from a copyright infringement claim unless faculty follow the FU Book **Guidelines**, have sought permission for copying that exceeds the provisions of the **Guidelines**, or first cleared the copying with the University's General Counsel.

The FU **Guidelines** have much to say about narrow limits in determination of what are permissible quantities. Some of these parameters have been attacked for being far too restrictive to apply to post-secondary schools. However, as of this time, those **Guidelines** have not been amended or replaced and they are widely used and supported in most educational quarters. They are particularly restrictive if multiple copies of a portion of a copyrighted work are made, since a teacher must then fall into line with the tests for "brevity", "spontaneity" and "cumulative effect" as oppresively defined therein. Further, each copy must include a notice of copyright. The brevity test set forth criteria that would in many cases be much less than 10%.

For single copies, the **Guidelines** are more relaxed and generally allow up to

> "[a] chapter from a book; [a]n article from a periodical or newspaper", etc.[10]

## Anthologies

Of direct import to classroom and reserve library copying,

> "[c]opying shall not be used to create or to replace or substitute for anthologies, compilations or collective works."[11]

This means that grouping a number of articles from the same or different sources for the purpose of bundling a convenient packet of copyrighted materials for the student, is a clear prohibition of FU. Consult the book and music **Guidelines**.[12] Note that this applies whether you are making single or multiple copies. Further, the **Guidelines** go on to say that

> "[s]uch replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately."[13]

In other words, if you submit the first chapter of a book to be placed on reserve the first week of the semester, and two weeks later, place the fourth chapter of that same work on reserve for the very same course, you're beginning to create an anthology. It would be the same as if they were put on simultaneously in the first instance. This would be a form of "time-shifting."

What if you have assembled a group of articles and book chapters from different sources and you wish to have your students use them one at a time thoughout the course of the semester? Is this a case of "anthologizing"? It seems clear that if you have assembled them for repeated or permanent use (semester after semester) or as a substitution for students purchasing their own copies, it would be. Another general prohibition is that

> "[c]opying shall not...(c) be repeated with respect to the same item by the same teacher from term to term."[14]

Presumably, the spontaneity test for multiple copies would no longer apply in this case since the teacher would have sufficient time to request permission from the copyright owner for continuous use. If the intent was to use the copies for a one-time use (one semester only) and the readings were supplemental (not the main text of the course), the use would likely not be considered an anthology, and would probably be a FU, provided that the terms of the definition of "cumulative effect" in the book **Guidelines**[15] were not ignored.

Admittedly, there are a raft of instances where what teachers have submitted for reserve perplex librarians, and this is likely to continue. For instance, how many items constitute an anthology? Two or more? Seven or more? More? How closely allied must the material be? What if the collection is not a body of unified or associated items but is grouped for the convenience of students? Just exactly what defines an aggregate? A collection? Where are the lines to be drawn? Must teachers and librarians wrestle with these questions and thus run the risk of poor interpretation? Shouldn't this be left in the hands of administrators or legal counsel?

Obviously, each institution will have to deliberate what approach it will take to resolve questions like these. The wisest choice may not be economical. Until the copyright court cases form better definitional outlines of these concepts, risks will be inevitable, or else good teaching may needlessly be hampered by conservative institutional regulations. Before submitting copies to reserve, teachers need to more carefully consider just what quantity and grouping of like materials indeed promotes good teaching and is within the intent of FU, and what levels of copying amounts to anthologizing or even spoonfeeding students. Beside the legal question, the latter practice may keep them from learning how to do their own research at deeper strata than that of mere basics.

## Library Copying

Librarians will continue to walk a fine tightrope since libraries must also be subject to the provisions of section 108. Here again, very specific provisions are set forth as exemptions on what would otherwise be infringements. Reserve copying falls under section 108, subsections (d) and (g). Subsection (d) states that

> "[t]he rights of reproduction and distribution under this section apply to a copy, made from the collection of a

> library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if-
>
> (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research..."[16] [my emphasis]

As is quite evident, very similar amount provisions for tolerable copying found in the **Guidelines** is likewise shadowed here. Generally speaking, a "small part" is commonly interpreted to be 10% or less of the work, or one article from a periodical, or one chapter from a book. The reason most libraries insist on returning copied materials at the end of the semester to the teacher stems from the statement above that the copy must become the property of the user, namely, with respect to reserve, the teacher. Much in the same fashion as the FU **Guidelines** put strictures on "anthologizing" and the effects of accumulation, subsection 108 (g) raises the same issue. It states that

> "[t]he rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee-
>
> (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
>
> (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d)..."[17]

Though the terms used here are somewhat elastic (or outright rubbery!), the message is strikingly parallel to the anthology principle found in the FU **Guidelines**. This is why librarians must have an integral voice in formulating, with or without legal counsel, a reserve copyright policy governing the use of teacher- , student- or librarian-made copies. Hopefully, the policies developed with respect to intellectual property laws and the needs of teachers will have boundaries circumscribed by fully assimilated knowledge of the issues and regulations intelligently applied by librarians.

## Conclusion

Owners of copyright have exclusive rights in their works [see section 106 of the **Copyright Act**] and users of those intellectual products have no vested rights - only privileges or exemptions (similar to easements in real property) where specific limitations on those rights have been created by law or the courts. It's complement is found in real property rights where the owner has

(1) the right of use,
(2) the right to exclude others from use,
and (3) the right to transfer ownership of it.

These are just some of the issues that must be looked at in relation to library reserve copying. We can wear blinders or we can be well informed and arrive at decisions that will exercise the privileges of the FU **Guidelines** by generally staying within the provisions laid out there, while being in the spirit and intent of the FU provisions in section 107. When copied material is submitted for reserve usage, by virtue of Title 17 of the **Copyright Act**, provisions of section 108 also enter the picture. Librarians should be sure the use is in full compliance with those provisions. If it is a usage determined to be outside those realms, the teacher should be so informed and the material should be returned without going on public reserve. Knowledge and wisdom, but also sensitivity, is needed by all parties (from owners to users) before adopting policy judgments and procedures to be used in handling teacher/librarian reserve copyright conflicts. And conflicts there most certainly will be!

## References


1. United States Code, Title 17, Copyrights, 94th Congress, 19 October 1976, P.L. 94-553.

2. Ibid.

3. U.S. House of Representatives. Report No. 94-1476, Copyright Law Revision, 94th Congress, 2d Sess., 3 September 1976.

4. U.S. Senate. Report No. 94-473, Copyright Law Revision, 94th Congress, 1st Sess., 18 November 1975.

5. U.S. House of Representatives. Report No. 94-1733, General Revision of the Copyright Law, Title 17 of the United States Code: Conference Report, 94th Congress, 2d Sess., 29 September 1976.

6. _____. Report No. 94-1476, Copyright Law Revision, 94th Congress, 2d Sess., 3 September 1976, p. 68-72.

7. United States Code, Title 17, Copyrights, 94th Congress, 19 October 1976, P.L. 94-553, p. 2546-48.

8. Ibid., Section 107(3), p. 2546.

9. _____, Section 101, p. 2543.

10. U.S. House of Representatives. Report No. 94-1476, Copyright Law Revision, 94th Congress, 2d Sess., 3 September 1976, p. 68. [I.A.-D.]

11. Ibid., p. 69. [III.(A)]

12. _____, p. 69, 71. [III.(A) & B.1.]

13. _____, p. 69. [III.(A)]

14. _____. [III.(C)(c)]

15. _____. [II.]

16. United States Code, Title 17, Copyrights, 94th Congress, 19 October 1976, P.L. 94-553, Section 108(d), p. 2547.

17. Ibid., Section 108(g), p. 2548.